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17 IN RE: TOYOTA MOTOR CORP.
UNINTENDED ACCELERATION
MARKETING, SALES PRACTICES,
AND PRODUCT LIABILITY
LITIGATION

18 SOUTHERN DIVISION
No. 8:10ML2151 JVS (FMOx)

19 PLAINTIFFS' PROPOSAL RE
THE CONTENT, FORMAT AND
TIMING OF THE TECHNICAL
TUTORIAL

20 Date: September 12, 2011
Time: 3:00 p.m.
Ctrm: 10C
Judge: Hon. James V. Selna

21 This Document Relates To:

22 ALL CASES

23 PLAINTIFFS' PROPOSAL RE THE CONTENT, FORMAT AND TIMING OF THE TECHNICAL TUTORIAL

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I. INTRODUCTION

In this complex case raising highly technical subject matters and concepts, a technical tutorial can provide an objective, non-adversarial explanation of the core technology. But, to be effective, the *content, format, and timing* of a tutorial is important. The purpose of a tutorial is to educate the Court, while avoiding controverted matters. Inherent to this, of course, is that both parties have a fair opportunity to understand that technology before being tasked with presenting a tutorial. Toyota has delayed and is attempting to narrow production of the core documents that would allow Plaintiffs fuller understanding of Toyota’s technologies.

Based upon discussions with Toyota’s counsel, it appears that Toyota seeks to broaden the tutorial’s scope far beyond uncontroversial matters about core technologies into hotly disputed issues about which Plaintiffs have – as yet – obtained no or at best partial discovery and which involved disputed core issues that will never be the appropriate subject of a non-adversarial tutorial.

A tutorial is also premature because tutorials best serve courts when connected to substantive motions and thereby aid the court's determination of a specific motion. A tutorial requires investment of time and efforts by the court and parties. To maximize that investment and avoid the inevitable fading of a tutorial's benefits over time, any tutorial here should be tied to a specific motion.

As for the tutorial’s content, we believe that the Court rightfully requested a tutorial to provide the necessary background on the advanced vehicle systems at issue in this case. The sole focus should be on Toyota’s ETCS, the pedal sensors, and brake-override systems, along with background on related components and software, and, finally, a basic glossary of terms.

Toyota’s proposal fundamentally misconstrues the purpose and scope of an appropriate tutorial. Rather than focusing on the technical components of its ETCS in an informal and objective format, Toyota proposes to include – indeed, focus on – a small number of controversial, manufacturer-driven (and therefore potentially biased) “studies” of the causes of UA mostly relating neither to Toyota’s vehicles nor electronic throttle systems. In addition, Toyota wants to engage in a biased and disputed discussion of the so-called history of UA involving GM, Audi and other auto manufacturers, and NHTSA’s pattern of siding with the auto industry in connection with such litigation and investigations. Finally, Toyota wants to argue that UA is really a fiction – made up by the press, consumer organizations and drivers who were really just confused and stepped on the wrong pedal.

Toyota would then turn to other topics that it believes have been inaccurately characterized in Plaintiffs' complaints, despite this Court's express warning against using the tutorial for such purposes. Under Toyota's proposal, the Court and jurists presiding over related litigation will not receive the technical background necessary to understand, and ultimately resolve, the substantive issues that will arise down the road. Instead, they would receive an adversarial presentation and argument of hotly-contested evidentiary issues, including a number of issues that promise to arise during *Daubert* briefing and hearings. The Court should reject such an approach.

II. ARGUMENT

A. A Tutorial Would Be Premature at this Time

Pursuant to Order No. 14, the technical tutorial has been set for December 10, 2011. However, at the time that Plaintiffs proposed and the Court ordered that the tutorial proceed on December 10, 2011, it was envisioned that Toyota would have

1 completed its Phase II document production by September 21, 2011, thereby giving
2 Plaintiffs and their experts nearly two months to review the documents *before* the
3 tutorial. However, the Phase II document production has subsequently been ordered
4 to be complete by late-January 2012 – well *after* the tutorial.
5

6 Postponing a tutorial until discovery is further advanced and the parties have
7 filed substantive motions, the core documents have been produced, and the source
8 code review has commenced – would better serve the Court and parties for several
9 reasons.

10 **1. Courts ordinarily conduct tutorials when the parties are on an
11 equal factual footing**

12 As the Court has recognized, the parties should be on equal factual footing to
13 prepare their tutorial presentations. The Court has explained that Plaintiffs should
14 have a fair opportunity to explore the relevant systems before any tutorial. Ex. 12
15 (11/09/10 Tr. at 58:5-12, 58:21-59:1 (making clear that the Court seeks “both sides’
16 informed view about what the technology is ...”)).¹ *See also* Ex. 13 (6/23/10 Tr. at
17 85:20-86:4). This requires that Plaintiffs receive responses to their discovery
18 requests served many months ago.

19 But this has not happened. The Court originally ordered the parties to complete
20 Phase II discovery by September 21, 2011. Order No. 14 (Dkt. No. 1493), at 3:19-20.
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27 ¹ All references to “Ex. __” are to the exhibits attached to the concurrently filed
28 Declaration of Steve W. Berman (“Berman Decl.”).

1 Toyota has stalled production of Phase II documents and improperly narrowed the
2 scope of its document searches, as Plaintiffs have already detailed to the Court.²

3 Toyota seeks advantage from its dawdling by nonetheless pressing for an
4 immediate tutorial, and indeed disparages Plaintiffs for requesting discovery at all:

5 "We need the documents!" in order to present the Court
6 with the background of the basic technical issues is an
7 argument whose time has run out. Indeed, in light of your
8 multiple complaints alleging in detail defects and
9 wrongdoing by Toyota, it is hard to see how you could
10 have made that argument in the first place. [Ex. 1 (Smith
11 8/12/11 Letter at 3).³]

12 By seeking an immediate tutorial on multiple disputed topics while withholding and
13 delaying discovery, Toyota would prejudice Plaintiffs by denying them the necessary
14 discovery to address those topics and sufficient time to review and analyze the
15 documents that have been produced to date.

16 Indeed, even as to the core tutorial topics – ETCS, brake-override systems, and
17 related topics – Plaintiffs have received some, but not all the relevant documentation,
18 despite long-standing discovery requests.⁴ The source code review has not even

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23 ² See Plaintiffs' Memorandum re Phase II and Phase III Discovery (Dkt. No. 1600),
24 at 1-7; see also Plaintiffs' Memorandum in Support of Plaintiffs' Proposed Phase III
Discovery Plan and Scheduling Order (Dkt. No. 1454), at 2-3, 5-7.

25 ³ Toyota seems to think that the fact Plaintiffs were able to plead their claims with
26 thorough and comprehensive allegations necessarily implies Plaintiffs could not
possibly need more information – a curious and incorrect interpretation of our
litigation system.

27 ⁴ Plaintiffs also served key discovery requests on these issues in their Eighth
28 Request for Production. Toyota's written responses to this discovery is due in

1 started yet. The same is true for the third topic Toyota proposes for the tutorial – the
2 regulatory history and technical aspects of the sticky-pedal and floor-mat recalls. It is
3 only fair that Plaintiffs obtain adequate discovery on these issues before they or the
4 Court are forced to accept Toyota’s explanations as part of a “neutral” tutorial.
5

6 In short, the Court has already indicated that Plaintiffs should have access to
7 the necessary discovery before the tutorial takes place. While the Court was focused
8 then on a proposed tutorial earlier this year, the basic premise that the Court will
9 need both sides’ informed views remains true.

10 **2. Courts hold tutorials to aid in substantive motions or trial**

11 An early tutorial is premature for another reason. Courts typically hold
12 pretrial tutorials in connection with pending substantive motions, such as for
13 summary judgment or preliminary injunction. The Court appears to agree with this
14 accepted practice. Toyota asserted during a hearing addressing the propriety of
15 holding a technical tutorial that certain factual disputes could be resolved by
16 “provid[ing] the Court the … basic understanding of these technologies.” Ex. 12
17 (11/09/10 Tr. at 58:2-4). But the Court deemed this an inappropriate subject for a
18 tutorial at this stage of the litigation:

19 *Court: [B]efore we get into any detailed technical*
20 *discussions in the context of a motion, it would be highly*
21 *desirable for the Court to have the benefit of both sides’*
22 *informed view about what the technology is[.] [Id. at*
23 *58:21-24 (emphasis added).]*

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27 November 2011. In its written response to Plaintiffs’ Ninth Request for Production,
28 Toyota refused to produce a single additional document.

1 Other courts similarly employ tutorials to aid in resolving substantive
2 motions.⁵

3 And this is as it should be – judicial economy demands it. A technical tutorial
4 requires investment of time and effort by the Court and parties. Such investment, to
5 be effective, should connect to a particular dispute. Whether the looming decision
6 involves trial, class certification, summary judgment or evaluating an expert under
7 *Daubert*, the decision provides context and focus to a tutorial’s lessons. Otherwise,
8 by the time a court is later asked to employ its technical learning, memories may
9 have faded, possibly necessitating a refresher course.

10 Here, of course, there is no such pending motion and the parties likely will not
11 be filing summary-judgment motions (if any) for 12 months. *See Order No. 14* (Dkt.
12 No. 1493), at 3:1 (setting September 17, 2012, as deadline for summary-judgment
13 motions). The deadline for *Daubert* motions to exclude expert testimony is one week
14 earlier. *Id.* at 3:7-8. To the extent a technical tutorial will aid the Court in resolving
15 any such motions, the most appropriate time is when those motions are briefed and
16 pending before the Court.

17 ⁵ *See, e.g., Philips Elecs. N. Am. Corp. v. Contec Corp.*, 177 Fed. Appx. 981, 984
18 (Fed. Cir. 2006) (referring to technology tutorial and summary-judgment hearing
19 before district court held on same day); *Web.com, Inc. v. The Go Daddy Group, Inc.*,
20 2008 U.S. Dist. LEXIS 108622, at *2-3 (D. Ariz. June 25, 2008) (setting technology
21 tutorial and summary-judgment hearing scheduled on same day in patent case);
22 *Computer Cache Coherency Corp. v. Via Techs., Inc.*, 2007 U.S. Dist. LEXIS 81121,
23 at *2 (N.D. Cal. Oct. 22, 2007) (same); *Trading Techs. Int’l, Inc. v. eSpeed, Inc.*,
24 2005 U.S. Dist. LEXIS 19043, at *1-2 (N.D. Ill. May 5, 2005) (referring to tutorial
25 relating to preliminary-injunction motion); *California v. M & P Invs.*, 213 F. Supp.
26 2d 1208 (E.D. Cal. 2002) (holding a tutorial “regarding the technical issues involved
27 in the motion for preliminary injunction”); *Sun Microsystems v. Microsoft Corp.*, 21
28 F. Supp. 2d 1109, 1118 (N.D. Cal. 1998) (conducting technology tutorial in reference
to pending motion to enjoin). *See also* Berman Decl., ¶ 4, Ex. 3 (attaching motion for
“neutral tutorial” in the AWP litigation to aid in class certification hearing).

1 In its recent letters to Plaintiffs' counsel, Toyota failed to identify any need for
2 an early tutorial or to tie the tutorial to case management in anyway. Toyota instead
3 alluded vaguely to the Court's need for a tutorial "to manage the complex issues in
4 this case" as well as any future anticipated *Daubert* motions.⁶ Toyota continued that
5 certain matters are "critical to the Court's complete understanding of the issues in
6 this case" and somehow could "guide the Court in deciding discovery and
7 evidentiary issues Toyota will raise" *Id.* *See also id.* at 3 ("it is also important
8 for the Court to know ..."). In other words, Toyota could not name any pending or
9 imminent substantive motion for which a technical tutorial might benefit the Court.
10 While Plaintiffs embrace enthusiastically any Court initiative to augment its facility
11 in the technical issues of this litigation, a tutorial will better aid the Court when
12 linked to a pending substantive dispute. A tutorial is devalued as an aid for the Court
13 without a pending motion. A tutorial in this case should thus await such motions,
14 currently scheduled for filing in September 2012.

17 **B. Neutral Tutorial That Will Prepare The Court for Expert Testimony and
18 Other Technical Presentations in This Case is the Appropriate Type
19 Tutorial – not Toyota's Effort to Litigate Core Issues**

20 **1. Whenever conducted, the tutorial should be an informal, objective,
21 and non-adversarial proceeding**

22 The Court has repeatedly explained that the purpose of the tutorial is to
23 provide *objective* information to the Court and judicial staff, and avoid disputed
24 issues. The tutorial should take a "global level" approach that simply explains "how
25 the system works." Ex. 14 (2/25/11 Tr. at 62:16-25). The purpose is to educate the

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⁶ Ex. 1 (Smith 8/12/11 Letter at 2).

1 Court “on the technology, which by and large *shouldn’t be that controversial.*”
2 Ex. 15 (7/18/11 Tr. at 46:21-25) (emphasis added).

3 The Court has also stressed that this tutorial is not a forum for adversarial
4 proceedings. Ex. 15 (7/18/11 Tr. at 46:18-19). Toyota urged the Court to broaden
5 the scope of any tutorial to include disputed issues that the Court may be called upon
6 to resolve in the future:

7 SMITH: [I]n first quarter of this year, Your Honor is
8 likely to be called upon to make some decisions on issues
9 like the protection of Toyota’s software, the reliability of
10 EDR tools, Notice of problems to Toyota.... The Court
11 needs to have this technical information as an underpinning
12 necessary to consider these issues.

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14 Ex. 12 (11/09/10 Tr. at 53:1-24).

15 The Court rejected this approach in favor of a short course on the “basic
16 technology” underlying the litigation:

17 COURT: Let me suggest ... what my concept of a tutorial
18 is. It is not to address potential misstatements. It’s to
19 discuss the basic technology. It’s a Saturday for 4 hours.
20
21 It’s an opportunity to educate me and my clerks.

22
23 *Id.* at 57. The Court continued, “a tutorial is not designed to refute every
24 misstatement or inaccuracy in the operative pleading. Rather, it’s intended to give
25 the Court and my clerks an overview of the relevant technology so that we can
26 understand it.” *Id.* at 57:4-9. It is not an opportunity for the parties to present
27 “radically different views as to what the technology is and how it works.” Ex. 15

(7/18/11 Tr. at 46:21-25). The Court has consistently asserted this view. *See* Ex. 13 (6/23/10 Tr. at 82:23-83:2 (“The purpose of the effort being to educate me and my clerks on the relevant technology or subject matter involved. That’s what I contemplate. It’s not an opportunity to argue the merits of the case but, rather, to literally educate me and my clerks.”)); Ex. 16 (5/13/10 Tr. at 62:6-8 (“My concept of a tutorial is just that. It’s to educate me and my clerks on the technology. It’s not an opportunity for advocacy.”)).

The recommendations of the *Manual for Complex Litigation, Fourth* (Federal Judicial Center 2004) (“*MCL 4th*” or “*Manual*”) are consistent with the Court’s views. The *MCL 4th* speaks broadly about assessing the need “for the court to be educated at the outset about the science or technology involved, particularly where the expert evidence will involve science and technology that use language foreign to the uninitiated.” *MCL 4th* § 23.32 at 497-98 (emphasis added). The *MCL 4th* provides further detail in its discussion on science tutorials in patent litigation.⁷ The goal is to provide an “objective overview” that provides a “general explanation of the substance and terminology of the science or technology.” *MCL 4th* § 33.23 at 615. The focus should be on “the fundamentals – the vocabulary and general intellectual framework of the subject matter.” *Id.* The *MCL 4th*’s suggestions mirror those of the Federal Judicial Center’s *Reference Manual on Scientific Evidence, Second* (Federal Judicial Center 2005), which suggests that “the object of this exercise should be educational, not argument.” *Id.* at 166. As the *Reference Manual* notes:

⁷ As the Court has often noted, this tutorial should take the approach of a science tutorial before a *Markman* hearing in a patent dispute. *See, e.g.*, Ex. 14 (2/25/11 Tr. at 63:20-64:4).

1 “by infusing the conference with a spirit of inquiry, the court can set the tone for the
2 litigation, encouraging clarity, candor, and civility.” *Id.* at 167.

3 Another court similarly cautioned against using a tutorial to advance
4 adversarial positions: “This is not a time when you advocate how I should decide
5 particular definitions and so forth, but it is a time when you explain basically what
6 these basic concepts are.... And this is very informal – we are on the record, but we
7 don’t take – we don’t put people under oath.” *Anticancer, Inc. v. Xegogen Corp.*,
8 No. 05-CV-04480B (S.D. Cal.), 6/13/06 Tr. at 22:3-25 (Ex. 17).

9 It is clear Toyota proposes to use the tutorial to advocate. For example,
10 Mr. Smith states in his letter (Ex. 1) explaining why the tutorial should involve
11 NHTSA’s analysis of complaint data that because NHTSA came to the “opposite
12 conclusion” as to the existence of a defect it is thus important for the Court to know
13 how complaint data “is used by NHTSA.”⁸ Again the nature of NHTSA’s database
14 is not technical and the real purpose of Toyota’s proposal is to use the tutorial to
15 debate the conclusions to be drawn from the complaint database – this is a debate for
16 trial, not a tutorial.

17

18 **C. Toyota Proposes an Adversarial Proceeding Akin to a Court Trial or
19 Evidentiary Hearing**

20 Rather than providing an informal, objective, uncontroversial, and non-
21 adversarial presentation, Toyota wants to use the tutorial as a forum to advance its
22 partisan interpretation of non-Toyota UA events and prior Toyota recalls, as one
23 would attempt at an evidentiary hearing or trial. Specifically, Toyota proposes to
24 address (1) the history of sudden unintended acceleration litigation and

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28 ⁸ Ex. 1 (Smith 8/12/11 Letter).

1 investigations, including examples of prior litigation against other auto
2 manufacturers, and papers written by NHTSA; (2) a description of the evolution of
3 ETCS in Toyota vehicles (including brake-override systems); (3) the regulatory
4 history and technical aspects of the sticky pedal and floor mat recalls; and (4) a
5 description of the NHTSA VOQ database, including “what that data is, how it is
6 collected and how it is used by NHTSA.”⁹ Of these topics, only the second is
7 consistent with the purpose of a tutorial as outlined above and by the Court at various
8 hearings. Yet, Toyota’s proposal is light on the details of even this topic.

10 **1. “Scientific and technical literature” on unintended acceleration
11 does not exist in the manner Toyota suggests and is not an
12 appropriate topic for the tutorial**

13 In its proposal, Toyota greatly emphasized its first proposed category, *i.e.*, “the
14 scientific and technical literature” related to the causes of UA. *See* Ex. 1 (Smith
15 8/12/11 Letter). Likening this auto litigation to a pharmaceutical case, Toyota posits
16 that the potential causes of the challenged phenomena (UA versus the side effect of
17 the drug), can be explored in a tutorial as much as the technical background of the
18 product (ETCS versus the pharmacology of the drug).

19 Toyota’s highly abstract comparison fails upon the slightest scrutiny. Apart
20 from being “products” cases, pharmaceutical litigation has too little in common with
21 automobile litigation – let alone auto litigation based on defects in highly technical
22 electronic systems and parts – to be of a useful guide. Crucially, the underlying body
23 of science in a pharmaceutical case, such as the *Vioxx* litigation, is drastically
24 different than in this case. Any given human medical condition is likely to have
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27 ⁹ Ex. 1 (Smith 8/12/11 Letter).

1 been studied intensively and for decades, and largely by independent, non-partisan
2 entities (in addition to manufacturer studies, which dominate the “science” here).
3 That is certainly true of the cardiovascular events caused by Vioxx, Bextra and
4 Celebrex, and other pharmaceuticals litigated in mass tort proceedings. From this
5 wealth of unbiased studies emerge an established, *uncontroversial* body of science to
6 present at a tutorial, in addition to the basic mechanics of the drug.
7

8 There is no basis for comparing the type of randomized clinical studies in a
9 case like *Vioxx* to the non-scientific and industry-oriented publication by NHTSA
10 that Toyota seeks to rely upon. There is no similar well of *scientific* information for
11 *this* case to present as an uncontroversial primer on the current scientific thinking on
12 the causes of UA in ETCS-equipped vehicles, let alone Toyota’s system in
13 particular. Indeed, there is no “scientific” literature on the cause of UA in even a
14 more general sense, as Plaintiffs’ invitation to Toyota to disclose any such literature
15 revealed.¹⁰ As discussed *infra* at 15-16, profit-oriented and liability-adverse
16 manufacturers designed and implemented many of these studies, immediately
17 injecting a strong source of bias. Unlike in cases involving medical issues, the
18 number of studies is small, and almost none of them are focused on Toyota vehicles.
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20 The “science” Toyota seeks to introduce now are NHTSA’s conclusions that
21 UA is caused by driver error, or pedals and mat issues. NHTSA’s conclusions are
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26 ¹⁰ Plaintiffs asked Mr. Smith to identify the scientific literature he refers to, he has
27 not refused. Berman Decl., ¶ 3. To the extent Smith refers to NHTSA studies
28 involving Toyota and other vehicles, the reliability and science behind NHTSA’s
conclusions are subject to vigorous dispute. See Berman Decl., ¶¶ 7-14.

1 hotly contested and are among the ultimate issues in the case – they are not the
2 neutral topics of a proper tutorial.¹¹

3 In this case, with Toyota’s reliance on highly limited, hotly-contested, and
4 manufacturer-driven “studies,” expert analysis will be critical. No party will be able
5 to discuss the studies without it, and the Court cannot fairly rely upon them without
6 the parties’ expert analysis and interpretation. And, because the parties sharply
7 disagree as to the meaning and import of these “studies” Toyota seeks to discuss at
8 an already busy hearing, a tutorial organized as Toyota proposes will detract from
9 the important goal of educating the Court and judicial staff about the technological
10 systems relevant to this litigation. Instead, it will quickly devolve into an adversarial
11 proceeding wherein both sides advance a disputed interpretation of this “science.”¹²

12 Including the disputed topics Toyota proposes will thus only distract from the
13 basic discussion that needs to take place, and thereby drastically limit the tutorial’s
14 utility. As the Court well knows, the parties will have every opportunity to present
15 their litigation positions in connection with their dueling *Daubert* motions. This
16 tutorial should serve an entirely different purpose – specifically, to educate the Court
17 on the systems and terminology of the ETCS, pedal sensors, and brake-override
18 systems.

19 **2. Toyota’s other topics similarly do not belong in a science tutorial**

20 Toyota’s other proposed topics suffer from a more fundamental problem –
21 they are not even scientific or technical in nature. For example, Toyota proposes to

22 ¹¹ See Berman Decl., ¶¶ 7-14 outlining the disputed and unreliable nature of this
23 “science.”

24 ¹² Berman Decl., ¶¶ 7-14.

1 discuss the “regulatory history” of the floor mat and sticky pedal recalls, but it has
2 not explained why the “regulatory history” of these recalls should be discussed at a
3 *science* tutorial.¹³ Similarly, Toyota wants to use the science tutorial to discuss
4 NHTSA’s Vehicle Owners Questionnaires (“VOQs”) – which, as the name suggests,
5 are questionnaires completed by vehicle owners reporting problems to NHTSA.
6 Toyota has stated that it wants to show that any allegation or inference in Plaintiffs’
7 complaints relating to the VOQs as evidence relating to problems with Toyota’s
8 ETCS is inaccurate.

9 Toyota openly admits it wants to raise these issues at the tutorial for reasons
10 the Court has already rejected. Whereas the Court explicitly warned that “a tutorial
11 is not designed to refute every misstatement or inaccuracy in the operative pleading,”
12 (Ex. 12 (11/09/10 Tr. at 57:4-9)), *see supra* at 8, Toyota wants to discuss the VOQ
13 precisely because it believes that the “operative Complaint relies so heavily” on it
14 (an inaccurate assessment) and that the data shows something different than what the
15 complaint alleges. Ex. 1 at 3. Toyota wants to discuss the recalls because of
16 Plaintiffs’ interpretation of the recalls in their complaints. *Id.* at 2. The tutorial is
17 not some catch-all, open forum to discuss whatever topic a party believes the Court
18 should better understand – that is a recipe for a contested, argumentative and
19 ultimately useless proto-evidentiary hearing. The content and format of Toyota’s
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¹³ Toyota also wants to address the “technical measures taken by Toyota” and the
26 recalls’ “technical history.” To the extent Toyota wants to present the Court with
27 timeline of the recalls, this is not complex enough for a tutorial. To the extent
28 Toyota wishes to describe the how, why and when of the recalls, these subjects will
be disputed. *See* Berman Decl., ¶¶ 15-23.

1 proposal more closely resembles a closing argument to the jury than a science
2 tutorial.

3 **3. A recent trial demonstrates the dangers of allowing an automobile-**
4 **manufacturer defendant to present a premature and one-sided**
explanation of the causes of sudden unintended acceleration

5 A recent UA case against Ford Motor Company, *Stimson v. Ford Motor*
6 *Company* (Florida Circuit Court, 5th Judicial District), highlights the importance of
7 maintaining a neutral, non-adversarial tutorial. The Ford UA litigation has been
8 proceeding for years, and the allegations and defenses in that litigation are similar to
9 those involved in the Toyota case. In *Stimson*, the Court recently issued a 51-page
10 order that set aside a defense jury verdict due to Ford's highly biased and deceptive
11 presentation of UA defects in its vehicles. *See Ex. 5.*

12 *Stimson* concerned an October 28, 2003 crash of a 1991 Ford Aerostar due to
13 an alleged UA incident that left Peggy Stimpson permanently paralyzed. *The court*
14 *criticized Ford for defrauding the Court and NHTSA by claiming that it knew of no*
15 *other cause of SUA other than driver error*, while systematically concealing (and
16 even destroying) testing, field reports, engineering reports, engineering and expert
17 analysis, and patents – developed over the course of years – showing that
18 electromagnetic interference was a frequent root cause of SUA in Ford vehicles.¹⁴

19 *Stimson* dramatically highlights the risk of premature and adversarial tutorials
20 introducing NHTSA's reports in these cutting-edge cases. The reality is that Toyota

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25 ¹⁴ The Court also discussed and ultimately dismissed as unreliable and
26 unpersuasive the much-relied-upon conclusions of *An Examination of Sudden*
27 *Acceleration* (1989), known within NHTSA as "The Silver Book" (Ex. 9). The
28 Silver Book in turn was relied upon by NHTSA in ruling in Toyota's favor on
various defect petitions. Berman Decl., ¶¶ 7-10.

1 retains an extraordinary degree of control over the evidence in this litigation – it is
2 intimately familiar with the implicated systems, including their design and testing,
3 the principal and often only recipient of field reports regarding UA and related
4 electronic defects, and the owner of proprietary hardware and software that may be
5 able to identify any errant behavior by the vehicles or their systems. Its fellow
6 manufacturers exercise comparable levels of control over evidence of defects in their
7 vehicles, and by extension, over studies of their vehicles.

9 As the *Stimpson* case demonstrates, reliance on NHTSA studies that may have
10 been tampered with by manufacturers is dangerous and unfair as Plaintiffs were not
11 parties to these prior studies.¹⁵

12 The Court should not accept that NHTSA studies and recall histories provide
13 uncontroverted “scientific” evidence in this case meriting attention in a tutorial. The
14 tutorial is not and need not serve as a dry run for trial. The Court should instead
15 restrict the tutorial to complex, technical – but uncontroversial – matters that
16 undergird the disputed issues and hold the tutorial only after full and fair discovery
17 has been completed.

19 III. CONCLUSION

21 For all these reasons, Plaintiffs request that the Court issue an order setting an
22 agenda for the tutorial that is consistent with Plaintiffs’ proposal, outlined above.

27 ¹⁵ Plaintiffs intend to show that NHTSA’s prior studies of Toyota are also flawed.
28 See Berman Decl., ¶¶ 11-14.

1 Dated: September 6, 2011

Respectfully submitted,

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1 **PROOF OF SERVICE**

2 I hereby certify that a true copy of the above document was served upon the
3 attorney of record for each other party through the Court's electronic filing service
on September 6, 2011.

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